VIA EMAIL appeals-southern-regional-office@fs.fed.us

US Forest Service
Attn: Appeal Reviewing Officer
1720 Peachtree Road, N.W., Suite 811N
Atlanta, GA 30309-9102

Re: Appeal by American Whitewater, et al., of Decisions for Amendments of the Revised Land and Resource Management Plan (Managing Recreation Uses, Chattooga River) of Forest Supervisors Diane Rubiaco, Paul Bradley and George Bain

Comments of Intervenor, the Rust Family

The elitist kayak lobby once again perverts the intent of the Constitution, the WSR Act and the Wilderness Act for its own benefit by falsely claiming the Chattooga was designated for paddlers, that the agency must work for the benefit of kayakers, that these conservation laws were written to protect the resource for the benefit of kayakers, and that private property has ceased to exist in America, at least with respect to someone with a high-tech kayak and paddle - who apparently floats above all law. In short, the claim for unrestricted access to the entire Chattooga and its tributaries amounts to nothing more than a claim that boating must be allowed anytime, anywhere, and under any circumstance - regardless of any contrary law.

In its latest appeal, the kayak lobby continues to present a panoply of erroneous claims and fraudulent misstatements of the laws concerning private property, public land management, the Chattooga designation literature, and the facts associated with the Forest Service analysis - many of which the agency has already rejected during the course of the kayak lobby's ongoing lawsuit in federal court. The Rust family shall highlight herein only a few of the numerous errors and misrepresentations found in the kayak lobby's appeal and otherwise simply incorporate by reference each document the family has previously submitted to the Forest Service in this protracted proceeding.

For example, here are just a few of the ludicrous claims of the kayak lobby in the Appeal:

- The Property Clause of the U.S. Constitution, which is limited to federal authority over land owned by the federal government, authorizes the Forest Service to manage private property owned by citizens. Appeal p.33.
- The 5th Amendment, which protects landowners from having their private property taken by the federal government somehow means that the Forest Service must allow trespass on private property or else it is depriving kayakers "of the liberty to do as Congress intended." Appeal p.55.
- Requiring paddlers who desire a "wilderness experience" to hike to a put-in spot amounts to an unlawful "banning" of floating, and landowners instead should be forced to allow paddlers to trespass on private property (Appeal p.28). Now, the mere convenience of boaters apparently trumps all laws!
- The determinations in the 1976 development plan that the upper portion of the Chattooga River "is wholly in private ownership" and so "[p]ublic access is limited" (41 Fed Reg. at 11,848) and in the 1971 report (p.62) that the upper reaches of the Chattooga are "non-

floatable" and "would not stand alone [for designation]" somehow means that "[p]addling is a value for which each foot of the upper Chattooga River was designated" (Appeal p.63).

- Paddlers can miraculously float at ordinary conditions the stream below Grimshawes bridge without touching the bottom, sides or bank of that stream (Appeal pp.33-34) even though the stream can be straddled in many places, walked across in many others without getting your feet wet, and is blocked in other spots by numerous down trees, rhododendron thickets, boulder fields or 25-foot corkscrew falls! Apparently, even the laws of physics do not apply to these paddlers.

Such a myopic, self-serving appeal from this recreational access lobby unfortunately has come to be expected. Rather than placating those who yell the loudest, the Forest Service instead should stand on principle and the law and make clear to the public and paddling constituents that WSR designation does not impact property rights. The agency should also stop providing a podium for the kayak lobby to disseminate such unbridled and unchecked misrepresentation of laws and facts.

I. The kayak lobby's claim that the federal government must take private property so <u>that boaters can avoid a one-mile hike is the height of arrogance</u>

The kayak lobby insinuates that the federal government forcibly take the family's private property so that "backcountry" kayakers can avoid a hike. Thus, on page 13 of the appeal, the kayak lobby argues that the WSR Act creates a mandate for the agency to acquire private property or establish easements for public access. On page 28 of the appeal, the kayak lobby makes clear what the purpose of such a taking would be – to avoid a one-mile hike. According to the appeal, such a hike "will have to occur with boats and gear that top 65 pounds when dry, and even more when wet." And whereas the appellants extol the virtues of primitive wilderness "hand-powered" paddlers "struggling with" a river (Appeal, p.41), apparently that primitive wilderness struggle involves no foot-power. And so the federal government must take private property. <u>Have constitutional protections of property rights so degenerated that land must be taken so that a select minority of "weekend warriors" can have the easiest, paved-road "wilderness experience"</u>?

Ironically, after years of claiming the family's property is public and navigable, the appellants now claim the property must be condemned for their personal use. Obviously, any need to condemn property indicates a concession by the kayak lobby of private ownership. Since title is no longer in dispute, the family again asks the USFS to make clear to the public that WSR designation

does not affect private property, that this area is in private ownership, that the agency has no authority to manage this property, and that the public has no rights to access this area.

Contrary to the appellants' claims, the designation literature and WSR laws make clear that by law the agency cannot acquire title to the land via condemnation. For example, the 1971 Report (p.67) itself indicated that "land acquisition and easement efforts may have an adverse affect on some landowners. The 'willing seller' approach should minimize this." So also, "[m]ost [landowners] will naturally oppose the public trespassing on their lands, or fishing or floating the Chattooga across their lands. [They] will certainly not tolerate recreation users encroaching on their private properties, trampling through their yards and invading their personal privacy. Several of these landowners have no intention of ever selling or giving up their lands." *Id.* at 93 (emphasis added). Similarly, the Department of Agriculture undersecretary reported that concerns of private property owners had been addressed in the designation public comment process:

> Some concern was expressed by a few local landowners over the possibility that designation of the river would affect their property rights. These concerns were primarily a result of a lack of full understanding as to the provisions of the Wild and Scenic Rivers Act regarding land acquisition.

P.L. 93-279, pg 3018. So also, the 1977 management plan (p.28) provided simply: "Condemnation of land is prohibited by the National Wild and Scenic Rivers Act."

The designation literature and laws regarding scenic easements also indicate that such easements would only be acquired to protect the basic resource or scenic quality (not to create public access, and certainly not where other access to the river exists nearby with a bit of exercise). *See e.g.*, 1977 management plan, p.28. Finally, the terms of such scenic easements are also limited (in the statutes and designation literature) to what is consented to by the landowner.

The kayak lobby finally admits that all of its rhetoric concerning access at Grimshawes bridge boils down to only one thing – that this spot would be more convenient for "back country" paddlers. At last, the Forest Service and public can see the kayak lobby's claim for what it really is – a claim that the convenience of a few paddlers trumps the rights of all other citizens and all other laws.

II. The upper Chattooga was not designated because of floating.

Another oft-repeated but erroneous mantra of the kayak lobby is that the upper Chattooga was designated for floating. Repeating the same nonsense 100 times does not make it true. The family, Whiteside Cove Association, the Friends of the Upper Chattooga, and others have pointed out the fallacy of this claim a number of times and the family refers the Forest Service to these prior statements and pleadings, which are already in the record.

Just in summary, however, a full review of the designation literature shows the upper Chattooga would have been ineligible for WSR designation had it not been analyzed with the lower sections. Thus on page 62 of the 1971 report, it was noted (emphasis added): "A series of dams on the Chattooga would so seriously segment, reduce the length, and regulate flows of the reaming reaches as to eliminate river character. The upper non-floatable reaches (sec I and II) cannot stand alone." The term "sec I and II" refers to the Chattooga above highway 28. The 1973 congressional report indicates that "these [hydroelectric] sites would seriously impair the quality of the [whole] river and make it unsuitable for inclusion in the system." PL 93-279, p. 3011. Thus, the upper segment of the Chattooga was included as part of the designated whole in order to protect the free-flowing waters, not because of boating. To the contrary, as cited in the previous section, the

designation literature considered the headwaters non-floatable, which more likely indicates that the absence of floating is the value worthy of protection and enhancement.

And certainly, the numerous assurances that the uppermost stretch below Grimshawes bridge was wholly in private hands where public access was strictly limited, and that private property rights would be protected, makes abundantly clear that the private stretch was not added because of floating.

Respectfully submitted this 11th day of April, 2012.

/S/Alan R. Jenkins
Alan R. Jenkins
COUNSEL FOR THE RUST FAMILY

Jenkins at Law, LLC
2265 Roswell Rd., Suite 100
Marietta, GA 30062
(770) 509-4866
aj@jenkinsatlaw.com

cc: Kevin Colburn, J. Nathan Galbreath, R. Brian Hendrix for the Appellants